Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOHN N. KELLY, TECHNICAL SERGEANT, UNITED STATES AIR FORCE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

MARK JEFFREY SIMMS
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
Appellate Defense Division
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113

August 1994

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QUESTIONS PRESENTED

I

Whether the trial court's refusal of petitioner's request to have his appointed consultant present in court to assist in the cross-examination of the United States' expert witness deprived petitioner of his rights under the Fifth and Sixth Amendments of the United States Constitution.

II

Whether the trial court's refusal to allow petitioner to retain new counsel after the trial judge questioned petitioner's counsel's competence deprived petitioner of his rights under the Fifth and Sixth Amendments of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, John N. Kelly, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on 31 May 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, reported at 39 M.J. 235 (C.M.A. 1994), is located at Appendix A. The unpublished decision of the United States Air Force Court of Military Review, *United States v. Kelly,* ACM 28730 (A.F.C.M.R. 16 April 1992) is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 31 May 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1259(3) (West 1993) and 10 U.S.C.A. Section 867a (West 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law". The Sixth Amendment of the Constitution of the United States provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

At a general court-martial composed of officer members petitioner was convicted of wrongful use of cocaine and sentenced to a bad conduct discharge, hard labor without confinement for one month, and reduction to the grade of E-3. R. 245. The convening authority approved a sentence of a bad conduct discharge and reduction to E-3.

The evidence against petitioner consisted of a positive urinalysis test result. Prior to trial petitioner requested the appointment of a consultant in the area of forensic toxicology to assist in trial preparation. *See* Appellate Exhibit III. The convening authority approved the request in part by making Dr. Jeffrey Gere available for telephone consultation and review of petitioner's urinalysis report. *See id.*

At trial petitioner moved for the presence of an expert consultant to assist in pretrial interviews of the government expert witness, Dr. Donald Frederick, and to assist counsel during the testimony and cross-examination of Dr. Frederick. *See* Appellate Exhibit I. Individual Defense Counsel Captain David F. Brash argued that telephone consultation during trial would require at a minimum the reading of verbatim transcripts of Dr. Frederick's testi-

mony to Dr. Gere. R. 10. The Military Judge denied petitioner's request to have Dr. Gere present at trial but informed petitioner that he would have sufficient opportunity to consult by telephone with Dr. Gere during trial. R. 13. The Military Judge invited petitioner to renew his motion, if appropriate. R. 13.

During Dr. Frederick's testimony petitioner renewed his request for the presence of the defense consultant. Captain Brash stated that some of Dr. Frederick's conclusions may be lost in translation despite efforts to record the testimony and that words which are important to a toxicologist may have no significant meaning to a layman. R. 134. The Military Judge characterized the request as "premature". R. 134-135. Dr. Frederick continued his testimony. *See* R. 136-168.

Following Dr. Frederick's testimony petitioner renewed his motion for production of Dr. Gere. Individual Defense Counsel informed the Military Judge that gaps existed in his notes of Dr. Frederick's testimony and requested a verbatim transcript of the testimony as well as a continuance for consultation with the defense consultant using the transcript. The Military Judge asked the court reporter to review tape recordings of Dr. Frederick's testimony with defense counsel during the evening recess to the extent necessary to complete counsel's notes. *See* R. 170. The court recessed at 1710 hours and reconvened the next day at 1300 hours. R. 171. Captain Brash stated he had not completed transcribing the tapes of Dr. Frederick's testimony and was not ready to proceed with cross-examination until the defense consultant could review a complete transcript. Individual Defense Counsel asserted that a meaningful consultation required a complete transcript because of the scientific vocabulary used by Dr. Frederick through his testimony. R. 172. The Military Judge responded by questioning counsel concerning his litigation

experience. Individual Defense Counsel answered the questions concerning his qualifications and trial preparation. R. 174-178. The Military Judge also asked questions posed by trial counsel regarding Captain Brash's qualifications. R. 178-181; Appellate Exhibit VI.

As a result of questions regarding Individual Defense Counsel's qualifications, petitioner requested new counsel. R. 178, 181. The Military Judge denied the request. R. 182. Captain Brash expressly reserved his objection to continuing with trial absent meaningful consultation with defense consultant. R. 183. Individual Defense Counsel proceeded with a brief cross-examination consisting essentially of two hypothetical questions – whether Dr. Frederick could determine from the urinalysis report whether the use of cocaine was knowing or wrongful. R. 184-185. The government rested at the conclusion of Dr. Frederick's testimony. R. 194.

On appeal to the United States Air Force Court of Military Review petitioner claimed among other issues that he was denied the assistance of an expert consultant in forensic toxicology and urinalysis testing and that the trial judge improperly denied his request for the appointment of a different individual defense counsel. *United States v. Kelly*, ACM 28730, unpub. 1, (A.F.C.M.R. 16 April 1992) (Appendix B). With regard to the first issue, the Court held that the consultation necessary in this case could have been accomplished by phone; that petitioner failed to demonstrate that the consultant's presence at trial was necessary or that his testimony was material; and that the trial judge did not err by refusing to order the consultant's presence at trial. *Id.* at 3. With regard to the second issue, the Court inferred that the request for substitute counsel may have been an attempt to preserve an issue for appeal; stated that the right to counsel is not absolute and must be balanced against the "efficient and orderly administration of

justice" (citing *United States v. Thomas,* 22 M.J. 57 (C.M.A. 1986)), and held that the trial judge did not abuse his discretion in denying petitioner's request. *Id.* at 4-5. The Court affirmed the findings of guilty and the sentence. *Id.* at 6.

Petitioner appealed the decision of the United States Air Force Court of Military Review to the United States Court of Military Appeals. The Court of Military Appeals held that petitioner failed to demonstrate the need for the appearance of the consultant in court or to otherwise demonstrate "meaningful denial of access." *United States v. Kelly,* 39 M.J. 235, 238 (C.M.A. 1994) (Appendix A). The Court also held that the request for new counsel may have been made "out of frustration" and that the military judge did not abuse his discretion in denying petitioner's request. *Id.* at 238. The Court of Military Appeals affirmed the decision of the United States Air Force Court of Military Review. *Id.*

REASONS FOR GRANTING THE WRIT

THIS COURT MAY DEFINE IN WHAT CIRCUMSTANCES THE PRESENCE IN COURT OF AN APPROVED DEFENSE CONSULTANT MAY BE REQUIRED.

Upon a proper showing of necessity, the accused is entitled to the assistance of an expert to aid in the preparation of his defense. *Ake v. Oklahoma,* 470 U.S. 68 (1985); *United States v. Burnette,* 29 M.J. 473 (C.M.A. 1990), *cert. denied,* 498 U.S. 821 (1990); *United States v. Garries,* 22 M.J. 288 (C.M.A. 1986), *cert. denied,* 479 U.S. 985 (1986). As a matter of military due process, a servicemember is entitled to investigative or other assistance when necessary for an adequate defense, without regard to indigency. *Garries,* 22 M.J. at 290 (citation omitted). Very little, if any, showing of necessity is required to entitle the defense to expert assistance in the interpretation of drug

analysis. *Burnette,* 29 M.J. at 475 (citing *United States v. Murphy,* 23 M.J. 310 (C.M.A. 1987)). Among the legitimate functions of an expert consultant is to assist the defense counsel in preparing the cross-examination of government experts. *See United States v. Fazzini,* 871 F.2d 635, *cert. denied,* 493 U.S. 982 (1989). Key to a successful defense demonstration of necessity for a consultant is a plausible showing that the expert could provide information that the defense and his staff would not be able to obtain on their own. *See United States v. Tornowski,* 29 M.J. 578, 580 (A.F.C.M.R. 1989), citing *United States v. True,* 28 M.J. 1057 (N.M.C.M.R. 1989).

Given the low standard of necessity required by *United States v. Garries,* the request of trial defense counsel to have the appointed consultant present in court was sufficient under *Ake v. Oklahoma* and its progeny. As the United States Court of Military Appeals noted in its decision in this case, the United States must present expert testimony regarding the laboratory procedures underlying urinalysis test results. *See United States v. Kelly,* 39 M.J. 235, 237-238 (C.M.A. 1994) (Appendix A) (citations omitted). Obviously, in a case involving a naked urinalysis, cross-examination of the United States' expert witness is crucial if not determinative. Despite Individual Defense Counsel's adequate experience and expertise in litigating urinalysis cases, Captain Brash is not a toxicologist and therefore lacked the technical expertise necessary to prepare cross-examination of Dr. Frederick. *See* Appellate Exhibit I and *United States v. Murphy,* 23 M.J. 310 (C.M.A. 1987) (military judge or members are not experts capable of interpreting scientific evidence in marijuana case; citation omitted). Captain Brash's need for expert assistance is highlighted by the fact that he attempted to transcribe Dr. Frederick's testimony himself after recess on 5 April 1990. R. 172. The fact that an experienced

defense counsel took valuable time in the midst of trial to transcribe the government expert's testimony so that he could relate the testimony verbatim to petitioner's consultant demonstrated his *bona fide* need for expert assistance in interpreting that testimony.

Granting the writ in this case would give this Court the opportunity to define the circumstances in which a defense consultant may be required to be allowed in court to aid an accused's counsel in cross-examining the prosecution's expert.

II

THIS COURT MAY FURTHER DEFINE THE RIGHT TO RETAIN COUNSEL OF ONE'S CHOICE WHEN RETAINED COUNSEL'S COMPETENCE IS QUESTIONED BY THE TRIAL JUDGE.

"[T]he most important decision a defendant makes in shaping his defense is his selection of an attorney." *United States v. Laura,* 607 F.2d 52, 56 (3d Cir. 1979). *Accord United States v. Kinard,* 21 U.S.C.M.A. 300, ____, 45 C.M.R. 74, 77 (C.M.A. 1972) (the right and opportunity to select counsel of one's choice is a valuable right accorded by law). The defendant should be afforded a fair opportunity to secure counsel of his own choice. *Powell v. Alabama,* 287 U.S. 45, 53 (1932). The right to counsel includes the right to a reasonable opportunity to select and be represented by one's chosen counsel. *See Gandy v. Alabama,* 569 F.2d 1318, 1323 (5th Cir. 1978). *See also Davis v. Stamler,* 650 F.2d 477 (3d Cir. 1981) (defendant must have a fair opportunity to secure counsel of his choice) (citation omitted).

"Due process demands that the defendant be afforded a fair opportunity to obtain the assistance of counsel of his choice to prepare and conduct his defense. The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel." *United States ex. rel. Carey v. Rundle*, 490 F.2d 1210, 1215 (3d Cir. 1969), *cert. denied sub nom. Carey v. Rundle*, 397 U.S. 946 (1970) (footnote omitted). "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (citations omitted). A defendant's choice of counsel is not to be dealt with lightly or arbitrarily. *United States v. Flanagan*, 679 F.2d 1072, 1076, *rev'd on other grounds*, 465 U.S. 259 (1984).

Among the factors to consider in the decision to grant or deny a continuance to allow a defendant to retain counsel are whether legitimate reasons exist for delay and whether the delay is the defendant's fault. *See United States v. Studley*, 783 F.2d 934, 938 (9th Cir. 1986), citing *United States v. Leavitt*, 608 F.2d 1290, 1293 (9th Cir. 1979) (per curiam). Interfering with a defendant's efforts to secure counsel and forcing on him representation by an undesired court appointed attorney may equal denial of a constitutional right. *See United States v. Rankin*, 779 F.2d 956, 958 (3d Cir. 1986). Prejudice is presumed from an arbitrary denial of an accused's right to be represented by counsel of his choice. *See id.* at 960, *United States v. Wilson*, 28 M.J. 1054, 1057 (N.M.C.M.R. 1989).

Following extensive *voir dire* of petitioner's Individual Defense Counsel, petitioner reasonably believed that the competence of his Individual Defense Counsel had been questioned and requested that he be replaced. Captain

Brash had acted as lead counsel throughout the case. It was certainly reasonable for accused, a layman, to question the competence of his counsel after he had been subjected to extensive *voir dire* by the Military Judge, which included questions submitted by trial counsel. That petitioner's doubt was reasonable is particularly true in the closed military community, emphasized even more so by the relatively small and insular legal community in the United States Air Force. Petitioner no doubt realized that he was being tried before a United States Air Force Judge Advocate as Military Judge, prosecuted by two United States Air Force Judge Advocates as Trial Counsel and Assistant Trial Counsel, and defended by two United States Air Force Judge Advocates as Individual Defense Counsel and Detailed Defense Counsel. From petitioner's viewpoint, the competence of his lead counsel was being questioned by two other United States Air Force Judge Advocates, one (Trial Counsel Captain Coakley) whom petitioner "respect[ed] highly." R. 182. Petitioner's concern was certainly reasonable.

Petitioner's concern was also held in good faith. The fact that his request for new counsel arose only after his lead counsel's competence was questioned demonstrates that the request for counsel was not merely a dilatory tactic. Petitioner's good faith was also demonstrated by the fact that he did not request removal of his Detailed Defense Counsel, Captain J. Robert Cantrall. *See* R. 182. Legitimate reasons existed for petitioner to request new counsel which involved no fault of the accused.

CONCLUSION

The instant case affords this Court the opportunity to address several issues clearly presented: the right of an accused to have an appointed defense consultant present in court, and the right of an accused to have counsel of his choice after the competence of his present counsel has been questioned by the court. These issues raise fundamental questions under the Fifth and Sixth Amendments of the United States Constitution and should be addressed by this Court in this case.

Respectfully submitted,

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

MARK JEFFREY SIMMS
Captain, United States Air Force
Appellate Defense Counsel
Counsel for the Petitioner

AIR FORCE LEGAL SERVICES AGENCY
Appellate Defense Division
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113

August 1994

APPENDIX

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 93-0052
CMR No. 28730

UNITED STATES, APPELLEE

v.

JOHN N. KELLY, TECHNICAL SERGEANT
U.S. AIR FORCE, APPELLANT

Argued December 2, 1993
Decided May 31, 1994

Counsel

For Appellant: *Captain Robert A. Parks* (argued); *Colonel Terry J. Woodhouse* (on brief); *Colonel Jay L. Cohen.*

For Appellee: *Captain Barnard N. Madsen* (argued); *Colonel Richard L. Purdon, Colonel Jeffery T. Infelise, Captain Thomas E. Wand* (on brief).

Military Judge: PERRY L. ANDERSON

Opinion of the Court

CRAWFORD, Judge:

Appellant was convicted by a general court-martial with members, contrary to his pleas, of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The court members sentenced

appellant to hard labor without confinement for 30 days, reduction to E-3, and a bad-conduct discharge. The convening authority approved only so much of the sentence as provided for the discharge and reduction. The Court of Military Review affirmed the findings and sentence in an unpublished opinion dated April 16, 1992. We granted review on the following issues:

I

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR THE PRESENCE AT TRIAL OF AN APPOINTED EXPERT CONSULTANT AND OTHERWISE DENYING MEANINGFUL ACCESS TO SAID EXPERT DURING TRIAL TO CONFRONT THE GOVERNMENT EXPERT.

II

WHETHER THE MILITARY JUDGE ERRED BY DENYING APPELLANT'S REQUEST FOR A NEW COUNSEL AFTER THE MILITARY JUDGE QUESTIONED DETAILED COUNSEL'S COMPETENCE TO LITIGATE CASES INVOLVING URINALYSIS TESTING.

FACTS

Prior to trial the convening authority approved the defense request to make Major Jeffrey Gere, M.D., available for a telephone consultation and review of appellant's urinalysis laboratory report. The convening authority denied the portion of the defense request asking that Major Gere be present at trial. Appellant was represented at trial by a defense counsel whom he had individually requested and by a detailed military defense counsel.

Appellant renewed his request at trial for the presence of an expert consultant to assist in the pretrial interviews of the government expert, Dr. Donald Frederick (a civilian) and to guide counsel during the cross-examination of Dr. Frederick. The military judge denied this request and indicated that the defense would be given sufficient opportunity to consult by telephone with Major Gere. He also invited the defense to renew the motion if appropriate.

After Dr. Frederick's testimony, appellant's requested defense counsel sought a continuance and verbatim transcript of Dr. Frederick's testimony. The military judge asked the court reporter to review the tape recordings of Dr. Frederick's testimony with the defense during the evening recess to allow defense counsel to complete his notes. The court recessed at 5:10 p.m. and reconvened at 1:00 p.m. the following day. At the 1:00 p.m. session under Article 39(a), UCMJ, 10 USC § 839(a), defense counsel announced that he had not quite completed his notes, so he had not yet conferred with Major Gere. The judge then offered defense counsel an additional hour to confer with Major Gere.

At no time during the trial did appellant identify any irregularity in the collecting or testing of appellant's urine or the conclusions reached by Dr. Frederick. Appellant also did not make a proffer as to what Major Gere would establish if he testified. Before commencing cross-examination of Dr. Frederick, defense counsel indicated he had "talked to Dr. Gere" and was ready to proceed.

When trial defense counsel had earlier informed the judge that he could not proceed with cross-examination until the defense consultant had reviewed a complete transcript rather than just his notes, the military judge inquired of counsel about his experience litigating urinalysis cases. After some reluctance to answer, counsel indicated that he had defended in excess of 100 cases, of which

approximately 15 to 20 involved urinalysis testing. Of those urinalysis cases, counsel testified that 6 to 10 involved trials with government expert witnesses and defense consultants. Counsel acknowledged that Major Gere had been a defense consultant for him on two occasions before and on those two occasions was present during "the entire trial."

The judge also established that defense counsel had: visited the Air Force Drug Testing Laboratory twice; attended six seminars at the Drug Testing Laboratory at Fort Meade; read twelve articles, books, periodicals, and journals; and consulted with at least nine experts on radioimmunoassay or gas chromatography and mass spectrometry. After this exchange, the requested defense counsel announced that, since his "competency ha[d] been called into question," appellant no longer wished to be represented by that counsel. The military judge denied appellant's request for a new defense counsel.

RIGHT TO EXPERT CONSULTANT

In *Ake v. Oklahoma,* 470 U.S. 68 (1985), the Supreme Court in an 8-1 opinion applied a due process analysis in determining an accused's right to an expert. It held that a defendant in a capital case is entitled to access to a psychiatric examination and the necessary assistance to prepare a defense based on his mental condition, when sanity at the time of the offenses is seriously questioned. Ake "made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial." *Id.* at 74. The majority stressed that its ruling was based on the fact that defendant's mental condition at the time of the offense was "seriously in question." *Id.* at 70. The Supreme Court noted that it was not necessary for a state to "purchase for the indigent defendant all the assistance that his

wealthier counterpart might buy," but rather that due process requires that an indigent defendant be given the "basic tools" necessary to present his defense. *Id.* at 77 (quoting *Britt v. North Carolina,* 404 U.S. 226, 227 (1971)).

The right to an expert extends beyond the Due Process Clause. In *United States v. Robinson,* 39 MJ 88, 89 (CMA 1994), we stated:

> The Equal Protection Clause, *see, e.g., Britt v. North Carolina,* 404 U.S. 226, 227 (1971); the Due Process Clause, *see, e.g., Ake v. Oklahoma,* 470 U.S. 68 (1985), and *Caldwell v. Mississippi,* 472 U.S. 320 (1985); the Code (Art. 46, UCMJ, 10 USC § 846); and the Manual (RCM 703(d), Manual for Courts-Martial, United States, 1984) provide that servicemembers are entitled to expert assistance when necessary for an adequate defense. This right extends from the investigative stage through the appellate process. *Compare Halfacre v. Chambers,* 5 MJ 1099 (CMA July 13, 1976), *with United States v. Tharpe,* 38 MJ 8, 14 (CMA 1993), and *id.* at 27-29 (Wiss, J., dissenting).

(Footnote omitted.)

Unlike other jurisdictions, the military criminal justice system has not limited *Ake* to psychiatric assistance, *compare United States v. Burnette,* 29 MJ 473 (CMA) (no error in denying request for specific civilian experts), *cert. denied,* 498 U.S. 821 (1990); *United States v. Garries,* 22 MJ 288 (CMA) (not entitled to an investigative assistant because no showing of necessity), *cert. denied,* 479 U.S. 985 (1986), *with Siebert v. State,* 562 So. 2d 586, 590 (Ala. Cr. App. 1989) (*Ake* limited to psychiatrists), *aff'd,* 562 So.2d 600 (Ala. 1990); *Moore v. State,* 802 S.W.2d 367, 371 (Tex. App.--Dallas 1990) (*Ake* limited to insanity case), or to capital cases. Also *compare Burnette* and *Garries with*

Marlow v. State, 538 So. 2d 804, 807 (Ala. Cr. App. 1988); *Bannister v. State,* 726 S.W.2d 821, 828 (Mo. App. 1987); *State v. Aucoin,* 756 S.W.2d 705, 713-714 (Tenn. Cr. App. 1988). As we indicated in *United States v. Robinson,* 39 MJ at 89, the defense is required to make an initial showing of a particular need for the expert, citing *Moore v. Kemp,* 809 F.2d 702, 712 (11th Cir.), which stated

> that a defendant must demonstrate something more than a mere possibility of assistance from a requested expert; . . . [A] fair reading of these precedents [*Ake* and *Caldwell, infra*] is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. . . .

(*Cert. denied* in *Moore,* 481 U.S. 1054 (1987).) In *Caldwell v. Mississippi,* 472 U.S. 320, 323 n.1 (1985), the Supreme Court indicated it is not enough to state that an expert would be of great assistance.

The Government may not merely present documentary evidence of urinalysis test results but must also present expert testimony to explain the laboratory procedures used to obtain the results. *See, e.g., United States v. Murphy,* 23 MJ 310 (CMA 1987); *United States v. Harper,* 22 MJ 157 (CMA 1986). The defense may request expert assistance to respond to the Government's case, subject to a showing of necessity. Defense counsel are expected to educate themselves to attain competence in defending an issue presented in a particular case. There are a number of primary and secondary materials counsel may consult to attain competence. The requested defense counsel in this case acknowledged that Major Gere had been a defense consultant on two prior cases which he had litigated and that counsel had been involved in approximately 15-20 cases involving urinalysis testing.

Here, requested defense counsel not only had telephonic access but he himself was well aware of the issues in this case. In fact, the sources mentioned by defense counsel upon questioning by the military judge constitute a virtual litany of those sources needed to cross-examine Dr. Frederick, *i.e.*, articles, books, journals, periodicals, seminars, laboratory visits, consultation with experts in the field, and prior litigation experience. *See E. Imwinkelried, The Methods of Attacking Scientific Evidence* (2d ed. 1992). Additionally, defense counsel did not identify any potential irregularity in the collecting or testing of appellant's urine sample or make an offer of proof as to questions to be asked Major Gere. Absent these minimal showings, we hold that defense counsel did not demonstrate the necessity for the presence of the expert at trial or otherwise show meaningful denial of access.

REQUEST FOR NEW COUNSEL

The request for a change of counsel may have been made out of frustration when defense counsel had announced that appellant had called his competence into question. We hold that under the facts of this case the military judge did not abuse his discretion in denying this untimely request for new counsel. *United States v. Camanga,* 38 MJ 249 (CMA 1993).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM 28730

UNITED STATES

v.

TECHNICAL SERGEANT JOHN N. KELLY, FR373-62-7284
UNITED STATES AIR FORCE

---

16 April 1992

Sentence adjudged 7 April 1990 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Perry L. Anderson.

Approved sentence: Bad-conduct discharge, and reduction to E-3.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens, Major Ronald G. Morgan, Major Ronald A. Gregory, and Captain Darla G. Orndorff.

Appellate Counsel for the United States: Colonel William R. Dugan, Jr., Lieutenant Colonel Brenda J. Hollis, and Captain Thomas E. Wand.

Before

HODGSON, MCLAUTHLIN, and JAMES
Appellate Military Judges

OPINION OF THE COURT

HODGSON, Senior Judge:

Technical Sergeant Kelly was convicted of wrongfully using cocaine based solely on a positive urinalysis obtained through a consent search. His approved sentence is a bad-conduct discharge and reduction to the grade of E-3. On appeal the appellant claims he was denied the assistance of an expert consultant in forensic toxicology and urinalysis testing; that the trial judge improperly denied his request for the appointment of a different individual defense counsel; that the trial judge erred in not granting challenges for cause against two court-members; and that the post-trial procedures were defective. Although we find no merit in any of the assigned errors and affirm the appellant's conviction, some discussion of each issue is warranted.

REQUEST FOR AN EXPERT CONSULTANT

There is no dispute on the facts surrounding this question since the parties stipulated to the following circumstances for the purposes of ruling on the defense request. The prosecution's case against the appellant would be based on a positive urinalysis and the interpretation of the accompanying technical data. Dr. Donald Frederick, an expert in forensic toxicology who had access to the appellant's test results, would testify as a government witness about the validity, accuracy and significance of that test. He was made available to the defense for consultation by telephone.

Approximately a week before trial, the defense requested the convening authority to appoint a qualified expert in forensic toxicology as a consultant to assist in trial preparation. The defense further requested that the consultant be present during the direct and cross-examination

of the government's expert. While the defense suggested that this expert *might* be called to testify, there was no indication of any intention on their part to challenge the urinalysis test results in any manner.

The convening authority made Dr. Jeffrey Gere, a forensic toxicology expert, available via telephone to consult with the defense prior to and during the trial. He denied that portion of the defense request asking that Dr. Gere be present at trial.

In renewing the request for Dr. Gere's presence at trial before the military judge, the trial defense counsel urged that a "telephone consultation is inadequate because [they] would be forced to almost verbatim take down the government expert's direct testimony and read that over the phone to the defense consultant in order to have him give us proper advice." Defense counsel also suggested it was "too much to ask" to expect them to take extensive notes of Dr. Frederick's testimony. The trial defense counsel acknowledged he had spoken with Dr. Gere prior to trial, but defense counsel, when asked by the trial judge if there was a dispute over Frederick's proposed testimony declined to answer, claiming confidentiality. *See United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991). At no time did the defense identify any irregularity in the collecting or testing of the appellant's urine and the conclusions reached by Dr. Frederick. The trial judge refused to order Dr. Gere's presence at trial.

Upon completion of Dr. Frederick's direct testimony, the defense sought a continuance and a verbatim transcription of his testimony. The trial judge granted a recess until 1330 the next afternoon so that the defense counsel could listen to the trial tapes and augment their notes. When the trial resumed, the defense counsel announced that his verbatim transcription was not completed as he was "transcribing the tapes by hand without assistance of

the court reporter." It was his position that Dr. Frederick's testimony had to be given to the defense consultant on a "word-by-word" basis in order to not overlook "meanings that have no significance to the layman or lawyers [but] have much significance to toxicologists." The trial judge refused to grant any further delays, and, after a brief cross-examination of Dr. Federick, the defense rested.

United States v. Burnette, 29 M.J. 473 (C.M.A. 1990) established that, upon a proper showing of necessity, an accused is entitled to the assistance of an expert to aid in the preparation of his defense. *See also Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985), and *United States v. Garries,* 22 M.J. 288 (C.M.A. 1986), *cert. denied,* 479 U.S. 985, 107 S.Ct. 575, 93 L.Ed. 2d 578 (1986). However, such consultation in cases involving the interpretation of drug analyses need not require the presence of the expert at trial--such consultation can be adequately accomplished by phone. *Burnette* at 475, n.2.

Here, the appellant was provided the opportunity for a telephone consultation with a forensic toxicology expert, Dr. Gere, to assist his counsel in their trial preparation. *See Burnette, supra.* However, he failed to show that Gere's presence at trial was necessary or that his testimony was material. When offered the opportunity by the trial judge to show the need to have Gere present, the defense declined to reveal how Gere's evaluation of the litigation package differed from Dr. Frederick's, asserting a "confidentiality" claim. The defense did not, at any time, assert that procedural or interpretational errors were present in the collecting and testing of the appellant's urine. Dr. Gere was available to the defense as a consultant for trial preparation, and there is no showing in the record that his testimony as an expert witness was necessary or material. The trial judge did not err in refusing to order his presence at trial. *United States v. Burnette, supra*; *see also United States v. Turner,* 28 M.J. 487 (C.M.A. 1989).

APPOINTMENT OF NEW COUNSEL

During the trial defense counsel's renewal of his request to have Dr. Gere present at trial, the military judge apparently became annoyed at defense counsel's repeated assertions that he could not adequately defend the appellant without Gere being present in court.[1] This led the trial judge to ask appellant's counsel how long he had been a circuit defense counsel (CDC), and how many urinalysis cases he had defended. Initially, the defense counsel, Captain Brash, balked at answering the judge's questions, and answered only after conferring with the chief circuit defense counsel.

Ultimately, Brash stated he had been a CDC since June 1987 and had defended in excess of 100 cases of which approximately 15-20 involved urinalysis testing. Of the urinalysis cases, at least 6-10 were litigated trials involving government expert witnesses and the use of defense consultants. Brash acknowledged that Major Gere had been a defense consultant for him before and on two occasions was present during the entire trial.

When the dust from the above exchange settled, Sergeant Kelly announced that since his counsel's "competence has been called into issue," he no longer wished Captain Brash to represent him. He asked that new counsel be appointed. The trial judge denied the request.

In *United States v. Stevens*, 27 M.J. 626, 627 (A.F.C.M.R. 1988), *aff'd* 28 M.J. 159 (C.M.A. 1989), we addressed the right of an accused to have counsel of his choice. There we stated:

> It is a fundamental principle of military due process that a servicemember be afforded a reasonable oppor-

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[1] Earlier in the trial, defense counsel suggested that he was "scientifically unqualified to write down verbatim the scientific matters testified to by Dr. Frederick."

> tunity to be represented by counsel of his choice. However, the right to counsel of one's choice is not as absolute as is the right to assistance of counsel. Further, when a continuance is sought to retain counsel, the right to select a particular attorney must be balanced against the public's interest in the orderly administration of justice (citations omitted).

The situation in *Stevens* differs somewhat from the case before us. There, the accused requested a continuance until such time as his civilian lawyer, who had a busy trial docket, could be available to defend him. Here, the appellant sought to dismiss, in mid-trial, his lawyer and have a new one appointed. His request was ostensibly based on his conclusion that the trial judge thought his assigned lawyer was incompetent. Appellate government counsel suggest that the request for substitute counsel was a "transparent ploy" to salvage an appealable issue from the trial judge's refusal to order the government to have Major Gere present at trial. The facts tend to support this suggestion.

We note the trial judge did not even remotely suggest that defense counsel was incompetent. To the contrary, he established that he was an experienced trial attorney who had defended numerous urinalysis cases involving expert testimony. Further, he established that counsel was acquainted with Gere and had used him as an consultant in other trials. The thrust of the trial judge's questioning was that counsel was fully prepared to go forward in defending the case. On the other hand, the appellant chose to interpret the judge's behavior as indicating incompetence on his counsel's part and attempted to halt the trial mid-stream and start over.

The right to counsel of choice is not absolute and must be balanced against society's interest in the efficient and

orderly administration of justice. *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986). The decision whether to grant a request to substitute counsel in the midst of a trial is addressed to the sound discretion of the trial judge. *See United States v. Menoken*, 14 M.J. 10 (C.M.A. 1982). We find no such abuse of discretion here. *United States v. Thomas, supra*; *United States v. Stevens, supra.*

DENIAL OF CHALLENGES FOR CAUSE

One defense challenge was based on the member's belief that urinalysis results "tend to be" reliable. Appellate defense counsel claim this shows that the member was "clearly predisposed" to believe the government's proof. The record, however, established that the member was willing to set that feeling aside and judge the case on the facts alone. He further stated that he understood that the government had the burden to prove that the test results were reliable.

A second challenge was against a member based on the appearance of command influence flowing from her position as chief of the Quality Control Section in the Central Base Personnel Office. Trial defense counsel was quite candid when he announced that "this is a challenge in appearance as opposed to fact," and argued that "as a matter of appearance it would be improper to have [the member] sit on the case . . . ." Of course, an appearance of impropriety is not enough to sustain a challenge for cause. It must be established as a fact, not speculation. *See United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988); *see also United States v. Carfang*, 19 M.J. 839 (A.F.C.M.R. 1984).

After the trial judge denied both challenges for cause, the appellant used his peremptory challenge against the senior member but did not state that the peremptory chal-

lenge would have been exercised against another member if the challenge for cause had been granted. R.C.M. 912(f)(4); *see United States v. Olivari*, 33 M.J. 933 (C.G.C.M.R. 1991) (failure to comply with R.C.M. 912(f)(4) waives any appellate issue). Therefore, the issue was waived for appeal.

There are few areas where a military judge is granted greater deference on appeal than his ruling on a challenge for cause. It is for this reason that a denial of such a challenge will be reversed only where there is a clear abuse of discretion. *United States v. Reynolds*, 23 M.J. 292 (C.M.A. 1987). Had we not found waiver, we would find no abuse of discretion in the trial judge's denial of the two challenges for cause.

POST-TRIAL PROCEDURES

We have examined the various claimed defects in the staff judge advocate's recommendations and find them to be without merit. *United States v. Komorous*, 33 M.J. 907 (A.F.C.M.R. 1991); *United States v. Ralbovsky*, 32 M.J. 921 (A.F.C.M.R. 1991); *United States v. Pelletier*, 31 M.J. 501 (A.F.C.M.R. 1990). For the reasons stated the findings of guilty and the sentence are

AFFIRMED.

Judges McLAUTHLIN and JAMES concur.

[SEAL OMITTED]

OFFICIAL

/s/ Laura L. Green
LAURA L. GREEN
Clerk of Court
Court of Military Review

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